COURTS—SUPREME COURT—JURISDICTION—MANDAMUS TO COMPEL ENTRY OF JUDGMENT BY LOWER COURT.—Comp. Laws 1907, § 3179, made applicable to city courts by Laws Utah, 1901, § 109, § 28 (Comp. Laws 1907, §686 29) reads as follows: In an action arising on contract for the recovery of money or damages only, if no answer, demurrer, or motion has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, and the complaint and proof of service of summons shall have been filed, the clerk upon application of the plaintiff must enter default of the defendant, and immediately thereafter enter judgment for the amount specified in the complaint including costs against the defendant. Plaintiff had brought suit against a debtor, and from the facts it appears that all the requirements of the statute had been fulfilled on the part of the plaintiff; that the said plaintiff had requested the clerk to enter judgment in his favor because of the defendant's default, and that the clerk had refused so to do, his reason for such action being that the judge of the city court had directed him to enter no default judgment. Thereupon plaintiff brought this suit in the Supreme Court against the judge and the clerk of the city court, praying that the defendants be required to enter judgment as prayed for. *Held,* (1) that statutes allowing the clerk of the court to enter judgments in case of default are constitutional, and (2) where a clerk of a city court refused as ordered by the judge of the court to perform a legal duty to enter judgment by default, and the judge when applied to refused to compel the clerk to enter judgment, the supreme court in the exercise of its power to control the proceedings of lower courts, could by mandamus compel the clerk to act in the same manner as the judge of the lower court ought to have done. *Utah Ass'n of Credit Men* v. *Bowman, Judge, et al.* (1911), — Utah —, 113 Pac. 63.

The courts are in direct conflict as to the constitutionality of statutes allowing the clerk of the court to enter judgment in case of default. *Gamble* v. *Jacksonville etc. Ry. Co.,* 14 Fla. 226. The weight of authority would seem to be with the principal case. *Talbot* v. *Garretson,* 31 Ore. 256, 49 Pac. 978; *Sperling* v. *Calfee,* 7 Mont. 514; *Providence Tool Co.* v. *Prader,* 32 Cal. 634, although the better reasoning would seem to support the other view. *Hall* v. *Marks,* 34 Ill. 358; also see dissenting opinions in *Utah Ass'n of Credit Men* v. *Bowman,* supra; *Wells* v. *Morton,* 10 Wis. 468; *Crawford* v. *Beard,* 12 Ore. 447, 8 Pac. 537. All of the courts supporting the principal case are agreed on the general proposition that judicial power cannot be delegated to the clerk, and that in entering such a judgment he is performing a mere ministerial duty. But they reach this result by different routes. One theory is, that the decree, though in fact entered by the clerk, is, in the consideration of the law what it purports to be, the act and determination of the court itself. *Wells* v. *Morton,* supra; *Heinrich* v. *Englund,* 34 Minn. 395; *Crawford* v. *Beard,* supra; *Bullard* v. *Sherwood,* 85 N. Y. 253; *Risser* v. *Martin,* 86 Iowa, 392. The other line of reasoning is that the clerk in entering a default without an order from the court, derives all his power from the statute. *Providence Tool Co.* v. *Prader,* supra; *Wallace* v. *Eldredge,* 27 Cal. 496; *Sperling* v. *Calfee,* supra. The reason for the opposite

view is well expressed by Mr. Chief Justice WALKER in *Hall* v. *Marks*, supra; "The rendition of a judgment by default and the assessment of damages are judicial acts and belong to the judicial and not to the ministerial part of the court. It must be judicially determined that a sufficient summons has issued, and that legal service has been had on the defendant. The constitution confers these powers upon the judicial department. The clerk possesses no power or jurisdiction to render a judgment, but only to enter it under the express or implied order of the judge, and the constitution having prohibited him from the exercise of such a power, the general assembly cannot confer it." Admitting that the act of the clerk in rendering and entering a judgment of default is purely ministerial, the right to the writ of mandamus in order to coerce a particular judgment would seem to follow as a matter of course, since the character of the act and not the nature of the office is the controlling test. SPELLING, EXTRAORDINARY RELIEF, § 1384.

EMINENT DOMAIN—DAMAGES.—The defendant railway company condemned a strip of land running through a large automobile manufacturing plant owned by plaintiff. The strip took no substantial buildings, but it separated the principal portion of the factory from the testing track, and prevented the company from expanding in that direction on properties owned by the company. In a proceeding to determine the amount of damage to the plant, it was contended by the plaintiff that the opportunity for expansion had much to do with the value of manufacturing plants. The defendant attempted to prove in mitigation that there was land adjoining the plaintiff's land on the other side which was available for expansion, and could be purchased at a reasonable rate. *Held*, (MARSHALL, J., dissenting), the damages recoverable are to be measured by the difference between the fair market value of the whole property before taking and the value of what remains, considering the actual use of the land taken and the owner's intention as to its future use, as well as its adaptability for future use, and evidence that there are lands available for the plaintiff's expansion which adjoin the manufacturing plant on another side should not be considered in mitigation. *Jeffery et al.* v. *Osborne et al.* (1911), — Wis. —, 129 N. W. 931.

The court in considering the question of damages considered itself bound by the rule laid down in a former appeal of this case, in which the court gave as the reason for the exclusion of the evidence, that it is not material that he could move part of his plant to other land for the purpose of giving the appellant a right of way, and thus, in effect, swap land for the accommodation of appellant. *Jeffery* v. *Chicago, etc. R. R. Co.*, 138 Wis. 1, 119 N. W. 879. The general rule of mitigation of damages is that the person injured must use reasonable means to reduce the damages as far as possible. *French* v. *Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Harrison* v. *Mo. Pac. Ry. Co.*, 88 Mo. 625; *Jager* v. *City of N. Y.*, 35 Misc. Rep. 622, 75 App. Div. 258; *Kendall* v. *Chicago, etc. Ry. Co.* (Tex.) 95 S. W. 757. It would seem as though the evidence refused in the principal case should be admitted under that rule. In a case where the railroad took part of a race track used in training horses, the measure of damages was held to be the cost of building a new track.